

City Council

Study Session Agenda

March 13, 2018
Library Meeting Room
951 Spruce Street
7:00 PM

***Note: The time frames assigned to agenda items are estimates for guidance only.
Agenda items may be heard earlier or later than the listed time slot.***

- | | | |
|----------------|-------------|---|
| 7:00 pm | I. | Call to Order |
| 7:00 - 8:30 pm | II. | Open Government Training |
| 8:30 – 8:40 pm | III. | City Manager’s Report & Advanced Agenda |
| 8:40 – 8:45 pm | IV. | Identification of Future Agenda Items |
| 8:45 pm | V. | Adjourn |

SUBJECT: OPEN GOVERNMENT TRAINING

DATE: MARCH 13, 2018

PRESENTED BY: MEREDYTH MUTH, CITY CLERK

SUMMARY:

The City Council will have biennial open government training as required by the City Charter. The City Attorney will present the training.

FISCAL IMPACT:

None.

RECOMMENDATION:

N/A

ATTACHMENT(S):

None



City Council
March 13, 2018

Addendum #1
Items presented at the meeting

**City of Louisville
City Council Training**



Presented by Sam Light
Light | Kelle, P.C.
March 13, 2018

Introduction

- In this presentation, we will:
 - Examine governance as contrasted with administration, and respecting the allocation of responsibility in the organizational structure.
 - Review the state open meetings rules that relate to City meetings.
 - Discuss some cases on open meetings issues.
 - Review our local open meetings & discussion rules.

Governance – recognizing the role

- Whatever your role to the City prior to elected office, the role now is that of elected (or appointed) leaders – guardians – stewards – of the City.
- The protection of the City's interests & assets is perhaps your most critical function now.
- Council is analogous to the board of directors of a corporation – responsible for the whole.
- The guiding principle in decision making should be, "what is the right thing for the City?"

Governance - recognizing the role

- When you took office, you took an oath to uphold constitution, laws, and ordinances.
- What does that oath embody? A commitment:
 - To respect the boundaries and allocations of responsibility set by the City Charter, ordinances and policies, and other laws.
 - To stay within the "job description."
 - To lawful conduct, including constitutional requirements such as providing "due process" and following adopted criteria.
 - To ethical practices, including the avoidance of practices that lead to unwarranted financial or other gain.
- Being true to your oath will keep you on the path of best practices that "elevate" and keep you out of the path of liability.

Governance Models

- John Carver's work on "policy governance" is perhaps the most comprehensive model for board governance.
 - Addresses many common and recognizable inefficiencies in governing body-staff relationships.
 - Seems to have caught on—and is translatable to municipal governance—because one of its basic tenants is the distinction between governance versus management/administration, and the need to honor that distinction.
 - Carver, *Boards That Make A Difference* (2006).
 - More recent updating of policy governance model by Ken Schuetz, "Aligned Influence" - alignedinfluence.com

Policy Governance Basics

- **Ends versus means:** Governing body determines "ends," and CEO & staff determine and carry out "means."
- **Executive limitations:** Governing body sets forth the boundaries in carrying out the means, beyond which the CEO and staff must not cross... but, within those boundaries, the CEO determines the means.
- **Board-staff linkage:** Governing body determines the manner in which it delegates authority to the CEO, how it will evaluate CEO performance (in achieving the "ends" and meeting the executive limitations).
- **Governance process:** Governing body determines its own philosophy, the specifics of its own job, and its accountability.

Governance characteristics

- Is the governing body's focus on governance rather than management or administration?
 - Management is not the same as governance! Being a "super-manager" is still not governing.
- Governance is policy-setting, big picture, and forward-looking, rather than making reactive, case-by-case decisions as issues arise, or after a problem surfaces.
- The governing body should develop "a taste for the grand expanse of the big picture," and embrace that role within the organization.

Governance characteristics

- Do you take the long view? (Think CIP & Comp Plan).
- Do you recognize that while you have multiple members, you speak with one voice? ... "Deliberate in many voices, but speak with one."
- Is it recognized and agreed that while there may be dissension or disagreement, the CEO (i.e., the City Manager or other direct report) is accountable only for directions given by the body as a whole?
- Is that one voice directed at the CEO, the governing body's primary employee?
- Do we respect the allocations we have made, for example, between Council-CEO; between Council-Committees; between Committees-Staff?

Where are you focusing your effort?



Liability and the Governance-Management Distinction

- Why is this a liability issue?
 - Because disputes and claims can arise when people are acting outside their role - also referred to as "scope of employment."
 - You have personal protection from liability under the Governmental Immunity Act (GIA) if you are "within the scope of employment" and not acting "willfully and wantonly."
 - Concept of "scope of employment" applies to ALL persons covered by the GIA- including elected and appointed officials, employees, and authorized volunteers.
 - Means everyone needs to know their "job description".
- Conduct that is outside the "scope of employment" (SOE) or willful and wanton can result in claims and a loss of immunity.

Liability and the Governance-Management Distinction

- Why is this a liability issue; some real life examples:
 - An elected or appointed official making or directing a personnel decision entrusted to a department head or the CEO.
 - An elected official, CEO or staff signing contracts not properly approved.
 - Elected or appointed officials interfering with a routine permit that is staff's responsibility; or, staff making such a permit "a council issue" when it is clearly not...; or conversely...
 - The CEO or staff "punting" such an issue to council.
 - Acting "because it's our policy" when in fact there's no policy.
 - Warning signs: "He/she/they did what?!" "A. Can they do that?!"

Liability and the Governance-Management Distinction

- Understanding role distinction is particularly important in personnel matters.
- The Council has an appropriate role - but should act as a Council and focus on "big picture" issues:
 - Personnel rules.
 - City-wide personnel budget and pay plan.
 - Selection and supervision of the Council's "direct reports".
 - Overall City wide goals and priorities.

Liability and the Governance-Management Distinction

- Make sure your involvement in these "big picture" issues doesn't devolve into:
 - Selection, evaluation, or disciplinary matters involving a specific individual who's not a direct report.
 - Salary and details of job performance of specific individuals who aren't direct reports.
 - Becoming an individual "HR Manager" – if folks are bypassing the chain of command, how can you ever return to the proper chain of command?

Liability and the Governance-Management Distinction – City Charter Section 8-5

Section 8-5. Council's Relationship to Employees

- (a) The City Manager shall be responsible to the City Council for the proper administration of all matters placed in the Manager's charge by this Charter or by ordinance not inconsistent with this Charter.
- (b) Neither the Council nor any member of the Council shall dictate or interfere with the appointment of, or the duties of, any City employee subordinate to the City Manager, the City Attorney, or the Municipal Judge, or prevent or interfere with the exercise of judgment in the performance of the employee's City responsibilities.
- (c) A member of the Council may discuss any matter pertaining to City operations with any employee, including the City Manager, but shall not give any direct orders to any such employee.

Open Meetings Law – Overview

- What are the main open meetings rules?
- Who is covered?
- What is a "meeting"?
- Recent cases of interest.

Colorado Open Meetings Law ("OML")

"All regular and special meetings of the Council shall be open to the public."

- Charter Section 4.5

"It is declared to be a matter of statewide concern and the policy of this state that the formation of public policy is public business and may not be conducted in secret."

- Colorado Open Meetings Law

Open Meeting Rules

Two key rules:

- All meetings of a quorum or three or more members of a local public body (whichever is fewer) at which any public business is discussed or at which any formal action may be taken are public meetings open to public.
- Any meeting at which the adoption of any proposed policy, position, resolution, rule, regulation or formal action occurs or at which a majority or quorum of the body is in attendance, or is expected to be in attendance, shall be held only after full and timely notice to the public.

Who is covered?

- "Local Public Body" includes any board, committee, commission or other policymaking, rulemaking, advisory or formally constituted body of a political subdivision of the state.
- Also includes any public or private entity that has been delegated any "governmental decision-making function."
- The City Council is a "local public body."

Who is covered at the City

- City Council
- Formally Constituted Committees
- City Boards & Commissions
- City-affiliated non-profits
- Others?

What Constitutes a Meeting?

- A gathering convened in person, by telephone, electronically, or by other means of communication, of three or more members...
- And, it's a gathering "at which any public business is discussed."
- Thus, a gathering of three or more that is connected to your policy-making responsibilities as Council is subject to the OML.

Meetings not subject OML

- OML expressly does not apply to:
 - "any chance meeting or social gathering at which discussion of public business is not the central purpose."
 - Or to "persons on the administrative staff."
 - Or to meetings of fewer than 3 (unless 2 is a quorum)
- Per case law, OML also does not apply to attendance at a meeting called by another entity if not connected to the local public body's policy-making functions (but the other entity may itself be subject to the OML)

What is "public business"

- Costilla County v. Costilla County Conservancy District (2004)
 - Two of three county commissioners attended a meeting called by two state agencies and mine operator. The purpose of the meeting was to report about the mine's efforts to comply with the CDPH's settlement to prevent mine seepage.
 - The county commissioners did not actively participate at this meeting, but they had regular, noticed commissioner meetings both before and after this meeting where the seepage was discussed.
 - The county did not provide notice of this "meeting" of the commissioners. Did the county violate the OML?

Costilla County

- The Supreme Court said No, they Did Not.
- In discussing "what is public business," the Court stated: "[A] meeting must be part of the policy making process to be subject to the requirements of the OML. A meeting is part of the policy making process if it concerns a matter related to the policy making function of the ... public body holding or attending the meeting." *Dir. of City Comm'ys. v. Costilla Cty. Conservancy Dist.*, 88 P.3d 1188 (Colo. 2004).
- In this case, "the meeting... was not convened for the purpose of discussing or furthering public policy, and therefore it was not part of the policy-making process."

Costilla County

- The Court also held that even though a quorum (2/3) of the commissioners were present at the meeting, the commissioners were not required to have noticed the meeting, notwithstanding the plain language requiring notice when a quorum is present.
- Why? Reading the statute as a whole, the Court reasoned that to hold otherwise would produce an absurd result:

"If notice were required any time two commissioners attend a meeting called by another entity at which matters of public importance were discussed... the commissioners would have to post notice before attending school board meetings, DOT presentations about highway funding, or the Governor's State of the State address."

What is "Public business"

- Intermountain Rural Electric v. Colorado PUC (2012)
- In this case, the Governor's staff e-mailed the Chair of the PUC for input on the proposed Clean Air-Clean Jobs Act (the "Bill") that was in committee at the time.
- "An e-mail conversation ensued among the PUC Commissioners" about the proposed legislation, generally including proposed edits to the Bill, discussion among the Commissioners about the impact of the Bill on the PUC's authority and the Bill's new procedural requirements on the PUC.
- The PUC did not provide notice of this "meeting" of the commissioners. Did the PUC violate the OML?

IREA v. PUC

- The Court of Appeals held No, the PUC did not.
- "A commission does not engage in policy-making by providing input on proposed legislation, because passing legislation falls exclusively under the policy-making functions of the General Assembly and the Governor."
- "While the proposed legislation clearly had a potential effect on the PUC's future regulatory actions generally, forming an opinion on the legislation had no demonstrable connection to any pending regulatory action of the PUC here."
- Query: Is forming a Council opinion on legislation—or a legislative agenda for that matter—public policy?

Extra-meeting meetings:

- Colorado Off-Highway Vehicle Coalition v. Colorado Board of Parks & Outdoor Recreation (2012)
- The Parks & Outdoor Recreation ("Board") was considering changes to its policy regarding grant expenditures from its off-highway vehicle recreation fund.
- (It held several properly-noticed meetings to discuss the possible changes to the grant program.
- However, during the course of the considerations, three violations of the OML occurred.

Colorado Parks and Wildlife Board

- The Board admitted to the following:
 - Following a properly noticed meeting, the Board discussed proposed changes to the grant program via email, from which the public was excluded.
 - On another occasion, the Board held a meeting, from which the public was excluded, via telephone and email, to again discuss changes to the grant program.
 - Board members attended a meeting convened by another state agency and one member actively participated in discussions with constituent groups regarding the grant program, but the meeting was closed to the public.

Colorado Parks and Wildlife Board

- After being made aware of and admitting to the OML violations, the Board, in order to "cure" the violation, convened at its regularly scheduled public meeting, where it ultimately voted unanimously to approve changes to its grant program.
- Can a violation be "cured" this way? The court said yes, a public body can "cure" a prior OML violation by holding a subsequent complying meeting that is not a mere "rubber stamping" of an earlier decision."
- Can these points be reconciled?
- Do these cases suggest we can—or should—do anything differently?

Local Rules Refreshers - Meeting Prep.

- Agenda Must be Specific – "an itemized list of all subjects on which substantive discussions are reasonably expected or which may be the subject of formal action." (5-18(b))
- Post Notice and Agenda at least 72 hours in advance
- Four Places for Posting – City Hall, Rec. Center, Library and Police Station
- The Meeting Notice, Agenda and "Agenda-Related Material" are posted on the City website

Meetings – Handling of Documents

- "Agenda Related Materials" – which includes "the agenda, all reports, correspondence and other documents forwarded to a public body which provide background or recommendations concerning the subject of any agenda item" – must be made available/posted
- If not in the packet (or the correspondence file) and submitted at the meeting, it "shall be immediately made available to the public either by making copies available to the public at the meeting or by displaying the document." No discussion or consideration of the document shall occur unless the document is made available.

Conduct of Meetings

- Limitation on Substantive Discussions
 - Substantive discussion is not allowed on subjects which are not listed on agenda, or which are not substantially related to a subject listed on the agenda
- "Substantive discussions" means "debate, deliberation or other discussion about the merits, benefits, advantages or disadvantages of any proposed or possible resolution of any issue that will be or may be the subject of formal action by a public body."

Conduct of Study Sessions

- Study Sessions are meetings & are subject to the same rules regarding notice, agenda, and agenda-related materials
- "The purpose of study session meetings is to enable members of a public body to obtain information about and discuss matters of public business in a less formal atmosphere."
- "Full debate and deliberations about matters that may be the subject of formal action should occur at formal meetings of the public body to permit members of the public to participate meaningfully in, and to understand the grounds for, any formal action contemplated or taken by the public body."

Conduct of Study Sessions

• "No preliminary or final policy decision, fiscal decision, rule, regulation, resolution, ordinance, action approving a contract, action calling for the payment of money, or other formal action, shall be made or taken at any study session."

• For Council: What is your most effective and proper use of study sessions? What changes, if any, can or should be made?

Thank you for your
QUESTIONS?
